

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

NOVOTECH (AUSTRALIA) PTY  
LIMITED, an Australian  
proprietary limited company,

Plaintiff,

v.

SURECLINICAL INC., a Nevada  
corporation,

Defendant.

No. 2:22-cv-01259-JAM-AC

**ORDER GRANTING DEFENDANT  
SURECLINICAL INC.'S MOTIONS  
FOR PRELIMINARY INJUNCTION AND  
TO STAY**

The matter before the Court is SureClinical Inc.'s ("SureClinical") motions for preliminary injunction and to stay proceedings. See Mot. for Preliminary Inj. and to Stay ("Mot."), ECF No. 13. Novotech (Australia) Pty Limited ("Novotech") opposed the motions. See Opp'n, ECF No. 15. SureClinical replied. See Reply, ECF No. 17.

For the reasons set forth below, the Court GRANTS SureClinical's motions.<sup>1</sup>

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<sup>1</sup> This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for November 1, 2022.

I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

SureClinical licenses its copyrighted suite of cloud-based software applications to assist in the operation of clinical pharmaceutical trials and the management of their associated trial documents and data. Mot. at 3. SureClinical also provides consulting and engineering services to assist with configuration issues, which clients can purchase for an additional fee. Id. SureClinical alleges that access to its software platform is based on a subscription fee and a user fee. Id. at 4. The subscription fee is based on: (1) the SureClinical Master Subscription Agreement ("MSA"); (2) SureClinical's Order Forms; and (3) the terms and conditions available on SureClinical's website. Id. Novotech is a clinical research organization, which facilitates and manages clinical trials for biotechnology, pharmaceutical, and research clients. Opp'n at 4. In 2014, SureClinical and Novotech entered into a contract where SureClinical agreed to license its software to Novotech for use in Novotech's clinical trials. Mot. at 4-5; MSA, Exhibit 3 to Declaration of Rajiv Dharnidharka, ECF No. 13. Novotech alleges that its access to SureClinical's platform was contingent upon payment of an annual fee and a monthly per-trial fee. Opp'n at 5. SureClinical alleges that Novotech contracted to use SureClinical's software solely for its internal use with a limited number of one hundred named users and that Novotech expressly turned down the right to use and distribute SureClinical's platform outside of Novotech with users not affiliated with Novotech. Mot. at 5-6. Novotech contends that the MSA permitted access for: (1) Novotech's employees, agents,

1 representatives, consultants, and independent contractors;  
2 (2) Novotech's clients; (3) Novotech's clients' agents,  
3 employees, representatives, consultants, and independent  
4 contractors; (4) any other persons or entities Novotech bound to  
5 the MSA; and (5) the agents, employees, representatives,  
6 consultants, and independent contractors of those bound third  
7 parties. Opp'n at 4.

8 The MSA automatically renewed every year unless either party  
9 gave notice of their intention to not renew; Novotech expressed  
10 its intention to not renew the contract in February 2022 and to  
11 export its trial data off of SureClinical's platform to a new  
12 provider. Id. at 4-5. Under the MSA, the contract term is set  
13 to expire on December 31, 2022. Id. at 5. SureClinical alleges  
14 that in May 2022, upon conducting its first-ever analysis of its  
15 customers' access records and license terms, SureClinical  
16 discovered that Novotech had exceeded the limits of its license  
17 by granting access to SureClinical's platform to over one  
18 thousand external users, including multiple SureClinical  
19 competitors. Mot. at 8. SureClinical communicated this alleged  
20 breach of contract to Novotech and attempted to negotiate a  
21 resolution. Id. at 9. After several months without a  
22 resolution, SureClinical invoked its audit rights under the MSA  
23 in an attempt to compel Novotech to disclose more information  
24 about its documented use of SureClinical's platform to  
25 SureClinical's auditor, Miller Kaplan. Id. SureClinical alleges  
26 that Novotech has declined to comply with the audit and refuses  
27 to do so unless ordered by the Court, instead choosing to carry  
28 out these proceedings against SureClinical. Id. at 9-12.

1 Novotech contends that SureClinical retaliated against it after  
2 Novotech declined to renew the MSA by: (1) limiting Novotech's  
3 ability to export clinical data off of SureClinical's platform;  
4 (2) unilaterally modifying its use terms and license fee  
5 structure to charge an additional monthly user fee for any user  
6 who was not a Novotech employee; (3) accusing Novotech of  
7 breaching the MSA and committing copyright infringement; and  
8 (4) repeatedly threatening to terminate Novotech's access to the  
9 platform unless it pays additional fees and submits to an audit.  
10 Opp'n at 5-7.

11 On July 15, 2022, Novotech filed the operative complaint  
12 against SureClinical, alleging breach of contract and seeking  
13 declaratory relief from the Court regarding the parties'  
14 respective rights and obligations under the MSA. See Compl.,  
15 ECF. No. 1. SureClinical filed a first amended answer and  
16 counterclaim alleging breach of contract and copyright  
17 infringement and seeking declaratory relief on the disputed terms  
18 of the MSA. See First Amend. Answer and Counterclaim, ECF. No.  
19 12. SureClinical then filed these motions for preliminary  
20 injunction and stay seeking to (1) compel Novotech to comply with  
21 SureClinical's audit of its accounts and records relating to its  
22 use of SureClinical's platform and any related follow-up requests  
23 for information and (2) stay this action for sixty days from the  
24 date of the Court's order, pending completion of the audit. Mot.  
25 at 1-2. Novotech opposes the motions. See Opp'n. SureClinical  
26 replied. See Reply.

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## II. OPINION

A. Legal Standard

A preliminary injunction is an “extraordinary remedy” that a court may award only “upon a clear showing that the petitioner is entitled to such relief.” Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 22 (2008). To obtain a preliminary injunction, a petitioner must demonstrate that: (1) they will likely succeed on the merits, (2) they will suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in their favor, and (4) an injunction is in the public interest. Boardman v. Pacific Seafood Group, 822 F.3d 1011, 1020 (9th Cir. 2016) (quoting Winter, 555 U.S. at 20).

Post-Winter, the Ninth Circuit kept a “sliding scale approach” to preliminary injunctions known as the “serious questions test.” Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131 (9th Cir. 2011). Under this approach, a “likelihood” of success is not an absolute requirement. Id. at 1132. “Rather, serious questions going to the merits and a hardship balance that tips sharply toward the [petitioner] can support issuance of an injunction, assuming the other two elements of the Winter test are also met.” Drakes Bay Oyster Co. v. Jewell, 747 F.3d 1073, 1085 (9th Cir. 2014).

In assessing the propriety of a stay, the Court has “broad discretion to stay proceedings as an incident to its power to control its own docket.” Clinton v. Jones, 520 U.S. 681, 706 (1997). The Court must consider several factors when deciding whether to exercise that discretion to issue a stay: (1) the “possible damage which might result from granting a stay,”

1 (2) the "hardship or inequity which a party might suffer in being  
2 required to go forward," and (3) the "orderly course of justice  
3 measured in terms of the simplifying or complicating of issues,  
4 proof, and questions of law which could be expected to result  
5 from a stay." CMAX, Inc. v. Hall, 300 F.2d 265, 268 (9th Cir.  
6 1962).

7 The proponent of a stay bears the burden of showing that  
8 these factors, on balance, warrant a stay. Clinton, 520 U.S. at  
9 708. The moving party "must make out a clear case of hardship  
10 or inequity in being required to go forward, if there is even a  
11 fair possibility" that the stay will damage someone else.  
12 Landis v. N. Am. Co., 299 U.S. 248, 255 (1936).

13 B. Analysis

14 1. Motion for Preliminary Injunction

15 a. Factor One: Success on the Merits

16 SureClinical argues that it has a strong likelihood of  
17 success on the merits for both its breach of contract and  
18 copyright infringement claim. As for the breach of contract  
19 claim, SureClinical argues that it is undisputed that (1) the MSA  
20 was a valid contract between the parties and (2) Novotech has  
21 expressly refused to comply with SureClinical's audit under  
22 Section 11.8 of the MSA. Mot. at 15. SureClinical contends that  
23 Novotech's alleged sublicensing of its access to external users  
24 and its refusal to comply with the audit constitute breaches,  
25 which have cost SureClinical millions of dollars in damages in  
26 unpaid, unauthorized user fees and exposure to competitors;  
27 SureClinical further notes that its ability to properly assess  
28 the extent of its damages has been impeded by Novotech's refusal

1 to comply with the audit. Id. As for the copyright infringement  
2 claim, SureClinical claims that it is undisputed that it has a  
3 valid copyright over its platform that has been in place for the  
4 entire duration of the MSA. Id. at 16. SureClinical contends  
5 that its copyrights were infringed by Novotech when Novotech  
6 sublicensed its access to SureClinical's platform to hundreds or  
7 thousands of unauthorized users, without SureClinical's express  
8 authorization; therefore, SureClinical has a claim under both  
9 direct and contributory copyright infringement. Id. at 16-17.

10 Novotech responds that SureClinical is not likely to succeed  
11 on either claim. Novotech argues that it has not breached the  
12 terms of the MSA by exceeding its license or refusing to comply  
13 with Miller Kaplan's audit because (1) the MSA does not give  
14 SureClinical the right to unilaterally select an auditor;  
15 (2) Miller Kaplan is not a neutral auditor; (3) the MSA makes no  
16 distinction between internal and external users; and (4) the one  
17 hundred user limit referred to in the applicable Order Form only  
18 applies to SureEsign, SureClinical's version of DocuSign that  
19 Novotech rarely used. Opp'n at 12-13. Novotech further notes  
20 that the parties have contracted under the MSA's terms for eight  
21 years during which SureClinical has allowed Novotech and its non-  
22 employee users, including auditors and regulators, to have access  
23 to its platform for an annual and monthly per-trial fee; it was  
24 not until Novotech communicated its decision to not renew the  
25 MSA, that SureClinical raised the issues at the center of this  
26 action. Id. at 13.

27 The Court finds that SureClinical has demonstrated a  
28 likelihood of success on the merits of its breach of contract

1 claim. A cause of action for breach of contract requires a  
2 showing of: (1) a contract; (2) performance by petitioner or  
3 excuse for non-performance; (3) breach; and (4) damage to  
4 petitioner from the breach. Acoustics, Inc. v. Trepte Constr.  
5 Co., 14 Cal. App. 3d 887, 913 (Ct. App. 1971). Damages can  
6 include lost prospective profits; when the fact of damages is  
7 certain, the amount does not need to be exact, particularly when  
8 the defendant's wrongful acts have created the difficulty in  
9 proving the exact amount of the damages. Sargon Enterprises,  
10 Inc. v. Univ. of S. California, 55 Cal. 4th 747, 773-75 (2012).  
11 A contract is to be interpreted solely from the written  
12 provisions of the contract, if possible. Foster-Gardner, Inc. v.  
13 Nat'l Union Fire Ins. Co., 18 Cal. 4th 857, 868 (1998). "If the  
14 contractual language is clear and explicit, it governs." Id. If  
15 an alleged ambiguity in the contract is not resolved by the  
16 language or context of the contract, the ambiguity is "generally  
17 construed against the party who caused the uncertainty to exist."  
18 Id. The contract at issue in this action, the MSA, governs the  
19 applicable duties of SureClinical and Novotech. Under the plain  
20 terms of Section 11.8, SureClinical has the right to audit  
21 Novotech's records to ensure Novotech's compliance with the MSA's  
22 restrictions and Novotech is required to make requested records  
23 available for inspection by the auditor no later than ten days  
24 after receipt of SureClinical's audit notice. MSA at 8. Section  
25 2.4 also has a catch-all provision that expressly reserves to  
26 SureClinical all rights not expressly granted by the MSA. Id. at  
27 3. Given these provisions, the Court finds that SureClinical has  
28 demonstrated a likelihood of success on its claim that Novotech's



1 express refusal to comply with the Miller Kaplan audit  
2 constitutes a breach of Section 11.8 of the MSA. Novotech's  
3 first argument that the MSA does not give SureClinical the  
4 unilateral right to select an auditor runs contrary to Section  
5 2.4's catch-all provision, which reserves that right to  
6 SureClinical; Novotech's second argument against compliance due  
7 to Miller Kaplan's bias is not supported by the express terms of  
8 the MSA or any relevant legal authority. The remaining elements  
9 of existence of a contract and performance under the MSA by  
10 SureClinical have not been contested by Novotech. SureClinical  
11 has also sufficiently alleged damages from Novotech's breach in  
12 the form of lost profits from Novotech granting access to  
13 unauthorized users as well as Novotech's actions to impede  
14 SureClinical's full accounting of the alleged misconduct. Thus,  
15 SureClinical has demonstrated a likelihood of success on the  
16 merits for its breach of contract claim.

17 b. Factor Two: Irreparable Harm

18 SureClinical alleges that it has and will continue to suffer  
19 irreparable harm from Novotech's alleged conduct in the form of:  
20 (1) damage to its business model and goodwill due to its  
21 inability to control and monitor compliance with its software  
22 licenses; (2) an inability to quantify and address the total  
23 injury that SureClinical has suffered due to Novotech's alleged  
24 conduct; and (3) a risk that Novotech will erase evidence of its  
25 alleged misconduct. Mot. at 17-18.

26 Novotech responds that SureClinical's purported harms are  
27 not irreparable, nor would they be addressed by the requested  
28 injunctive relief. Opp'n at 17. Novotech contends that

1 SureClinical's alleged inability to control and monitor  
2 compliance is self-inflicted because Novotech remains open to  
3 being audited by a neutral auditor agreed upon by both parties;  
4 Novotech further notes that the information SureClinical seeks  
5 can be obtained through the discovery process, making the relief  
6 sought unnecessary. Id. Novotech argues that SureClinical fails  
7 to cite to any relevant or persuasive legal authority to support  
8 its second contention and notes again that discovery and expert  
9 opinion testimony remain available if the audit does not occur.  
10 Id. at 18. As for the third claim of possible destruction of  
11 material evidence, Novotech claims that SureClinical's concerns  
12 are unfounded because Novotech agreed to honor SureClinical's  
13 request for a litigation hold and does not intend to subject  
14 itself to sanctions from the Court by destroying evidence. Id.  
15 at 19. SureClinical also delayed seeking an injunction, which  
16 undermines its argument that Novotech is imminently planning to  
17 destroy evidence. Id. at 20.

18 The Court finds SureClinical's argument persuasive. A  
19 petitioner "may not obtain a preliminary injunction unless they  
20 can show that irreparable harm is likely to result in the absence  
21 of the injunction." Cottrell, 632 F. 3d at 1135. "Indeed,  
22 suffering irreparable harm prior to a determination of the merits  
23 is perhaps the single most important prerequisite for the  
24 issuance of a preliminary injunction." See Nutrition  
25 Distribution LLC v. Lecheek Nutrition Inc., No. CV 15-1322-MWF  
26 (MRWx), 2015 WL 12659907 (C.D. Cal. June 5, 2015) (internal  
27 citations omitted). The Ninth Circuit has established that  
28 irreparable harm can include damage to a company's brand,

1 reputation, or goodwill, particularly as they relate to standards  
2 of quality control and customer service; damage to one's  
3 competitive position and market share are also grounds for a  
4 finding of irreparable harm. Apple Inc. v. Psystar Corp., 673 F.  
5 Supp. 2d 943, 948-49 (N.D. Cal. 2009), aff'd, 658 F.3d 1150 (9th  
6 Cir. 2011); see also Regents of Univ. of California v. Am. Broad.  
7 Companies, Inc., 747 F.2d 511, 520 (9th Cir. 1984). SureClinical  
8 has sufficiently alleged both damage to its reputation and to its  
9 competitive position due to its ongoing inability to (1) monitor  
10 compliance with its license terms and (2) fully assess and  
11 control the allegedly unauthorized distribution of its product to  
12 non-paying users and potential competitors. While the Court  
13 notes SureClinical's delay in pursuing injunctive relief, delay  
14 is not "particularly probative in the context of ongoing,  
15 worsening injuries" and is insufficient on its own to dismiss a  
16 claim of irreparable harm. Disney Enterprises, Inc. v. VidAngel,  
17 Inc., 869 F.3d 848, 866 (9th Cir. 2017). Therefore, SureClinical  
18 has demonstrated irreparable harm absent an injunction.

19 c. Factor Three: Balance of the Equities

20 SureClinical contends that the balance of equities tips  
21 sharply in its favor because the requested audit is something  
22 that was contractually agreed to by the parties. Mot. at 21.  
23 SureClinical states that Novotech will not be adversely impacted  
24 by complying with the Miller Kaplan audit because SureClinical is  
25 paying for the audit and Novotech remains free to challenge its  
26 conclusions. Id. at 22. SureClinical claims that denial of the  
27 injunction would nullify the only contractual mechanism that  
28 SureClinical has to ensure compliance and would reward Novotech

1 for its alleged breach and misconduct. Id.

2 Novotech responds that SureClinical faces no hardships  
3 because Novotech remains open to an audit by an auditor jointly  
4 selected by the parties. Opp'n at 21. Novotech again asserts  
5 that SureClinical can obtain its requested information from the  
6 discovery process and that this motion for a preliminary  
7 injunction is simply a way for SureClinical to gain a tactical  
8 advantage in the underlying litigation. Id. By granting the  
9 injunction, the Court would be modifying Section 11.8 of the MSA  
10 to favor SureClinical's interpretation of its audit rights. Id.

11 The Court finds that the balance of equities weighs in favor  
12 of SureClinical. A court must "balance the interests of all  
13 parties and weigh the damage to each" in determining the balance  
14 of the equities. CTIA-The Wireless Ass'n v. City of Berkeley,  
15 California, 928 F.3d 832, 852 (9th Cir. 2019) (citing Stormans,  
16 Inc. v. Selecky, 586 F.3d 1109, 1138 (9th Cir. 2009)).

17 SureClinical's right to audit Novotech is a clear, express  
18 provision of the MSA agreed to by both parties; Novotech fails to  
19 identify a provision in the MSA that allows it to object to an  
20 audit on bias grounds. The audit provision demonstrates  
21 SureClinical's interest in ensuring compliance with its license  
22 provision and comes at no cost to Novotech if Novotech is  
23 complying. Novotech's claim that SureClinical can obtain its  
24 requested information from the discovery process does not excuse  
25 its contractual duties under the MSA and its claim that  
26 SureClinical seeks to gain a tactical advantage in the underlying  
27 litigation is unsupported by the facts.

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d. Factor Four: Public Interest

SureClinical argues that the injunction is in the public interest because the audit provision was intended to ensure that SureClinical can protect its copyrighted material. Mot. at 22. Novotech responds that SureClinical fails to support its argument with persuasive legal authority and that the public interest would not be served by allowing SureClinical to purportedly circumvent the limitations of discovery with its biased audit. Opp'n at 21-22. Considering the Court's disposition on the other Winter factors, it is not swayed one way or the other regarding the public interest. The issues raised by the parties under this factor are not dispositive in this case.

e. Bond

SureClinical also argues that the Court should not require a bond because Novotech has not put forth evidence that it would suffer damages by issuance of the injunction. Mot. at 23. Novotech has not requested a bond, and the Court does not require a bond for this injunction.

2. Motion to Stay

SureClinical moves for the Court to stay proceedings for sixty days pending the conclusion of the Miller Kaplan audit. Mot. at 23. SureClinical states that the case is still in its early stages; the parties have yet to meet and confer and there is no trial date set. Id. at 24. SureClinical claims that an audit would help simplify the issues in the underlying action by (1) allowing SureClinical to know the full scope of Novotech's use of SureClinical's platform, (2) proving Novotech an opportunity to explain the manner of its use of SureClinical's

1 platform, and (3) potentially remove the need for discovery on  
2 those issues. Id. SureClinical contends that granting a stay  
3 will not result in prejudice or undue tactical advantage because  
4 the requested information was due ten business days after  
5 SureClinical's audit notice pursuant to the MSA's terms and  
6 denying a stay could result in Novotech continuing its delay  
7 tactics through litigation. Id. at 25. SureClinical also argues  
8 that granting the stay would conserve judicial and party  
9 resources and time that would otherwise be spent on duplicative  
10 discovery efforts. Id. at 25.

11 Novotech contends that a stay would result in great damage  
12 to Novotech in the form of loss of access to SureClinical's  
13 platform on November 3, 2022, absent a favorable ruling on  
14 Novotech's injunction. Opp'n at 23. Novotech claims that  
15 SureClinical will not suffer harm if the stay is denied because  
16 SureClinical still has the opportunity to engage in discovery and  
17 litigation. Id. Novotech argues that the audit will not impact  
18 any issues central to the underlying litigation because the  
19 audit's conclusions are not binding and can be challenged. Id.  
20 at 23-24.

21 The Court finds SureClinical's argument persuasive. The  
22 Court has "broad discretion to stay proceedings." Clinton, 520  
23 U.S. at 706. The Court must consider several factors when  
24 deciding whether to exercise that discretion to issue a stay,  
25 namely: (1) possible damage resulting from the stay;  
26 (2) hardships or inequities to parties affected by the stay; and  
27 (3) whether particular issues will be simplified or complicated  
28 by the stay. Hall, 300 F.2d at 268. The Court finds that these

1 factors weigh in SureClinical's favor. The possible damage  
2 alleged by Novotech is speculative and can be addressed by its  
3 own pending motion for a preliminary injunction to enjoin  
4 SureClinical from cutting off its access to its platform.  
5 Neither party faces a material hardship or inequity by the  
6 issuance of the stay. To the contrary, granting the stay to  
7 allow time for the audit will allow the parties to fully abide by  
8 the terms of the MSA's audit provision. It will also allow the  
9 parties and the Court to gain more clarity on the extent of  
10 Novotech's use of SureClinical's licenses, simplifying a material  
11 issue in the underlying litigation.

12 III. ORDER

13 For the reasons set forth above, the Court GRANTS  
14 SureClinical's motion for preliminary injunction and GRANTS  
15 SureClinical's motion to stay proceedings for sixty days from the  
16 date of this order.

17 IT IS SO ORDERED.

18 Dated: December 2, 2022

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21 JOHN A. MENDEZ  
22 SENIOR UNITED STATES DISTRICT JUDGE  
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